DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 96-0233
Controlled Substance Excise Tax
For The Period: 1992

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ISSUES

I. Controlled Substance Excise Tax—Liability

Authority: IC 6-7-3-5; Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Department of State Revenue, 660 N.E.2d 319 (Ind. 1995).

The taxpayers contest the assessment of controlled substance excise tax.

STATEMENT OF FACTS

Taxpayers were arrested for possession and dealing of marijuana on November 13, 1992. At the time of the arrest, the two taxpayers were living together in a relationship. After the arrest, the marijuana was tested and weighed. The weight was 108 grams. The Department issued a jeopardy assessment against the taxpayers on December 3, 1992. One of the taxpayers ("D") pled guilty to dealing marijuana on July 16, 1993. The case against taxpayer D's girlfriend (hereinafter "C") was discontinued by the prosecutor.

I. Controlled Substance Excise Tax—Liability

DISCUSSION

In Indiana, the manufacture, possession or delivery of marijuana is taxable. IC 6-7-3-5. There was no controlled substances excise tax ("CSET") paid on the taxpayers' marijuana, so the Department assessed the tax against them and demanded payment. Indiana law specifically provides that notice of a proposed assessment is *prima facie* evidence that the Department's claim for the unpaid tax is valid. The taxpayers then bear the burden of proving that the proposed assessment is wrong.

The taxpayers argue that "D" has paid his debt to society by serving "home incarceration" for his violation of the law. The *gravamen* of the taxpayers' protest is that since D has served his criminal sanctions, the CSET assessment violates the double jeopardy clause of the United States Constitution. U.S. Const. amend. V. (*See also* Ind. Const. art. I, Sec. 14). The double jeopardy clause protects, among other things, a person from being put in jeopardy more than once for the same offense. Our Supreme Court has held that the CSET assessment is considered jeopardy under Constitutional analysis, and that the jeopardy attaches when the assessment is served on the taxpayer. Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995). The Department's jeopardy attached on December 3, 1992, making it the first jeopardy and the criminal conviction the second jeopardy. Although the taxpayers argue that it is inequitable to assess CSET, it is nonetheless grounded in case law.

In Hall v. Indiana Department of State Revenue, the Indiana Supreme Court ruled that CSET constituted the first jeopardy, the plea of guilty to the criminal charges the second. 660 N.E.2d 319 (Ind. 1995). In that case, police entered the home of the Keith and Mary Hall, finding over 300 lbs. of marijuana. Four days after the arrest, the Indiana Department of Revenue assessed Keith Hall and his wife with a CSET assessment. After the assessment, Keith Hall pled guilty and the charges against Mary were dropped. The Indiana Supreme Court held that the CSET assessment was first in time, and that the conviction was the second jeopardy. Thus the criminal conviction, not the CSET assessment, violated the double jeopardy clause. The Court also noted that "Mary was subjected to neither criminal prosecution nor punishment, and therefore conclude the CSET was her only jeopardy." Id. at 321. Hall is directly on point for both taxpayers since D pled guilty *after* the Department's jeopardy had attached, and the case against C was dropped, thus making the CSET assessment her only jeopardy.

Given that the Department's jeopardy attached first, and the taxpayer has not overcome the *prima facie* burden of disproving possession, the protest is denied. It should be noted that taxpayer D pled guilty—which constitutes an admission and can be used by the Department as evidence of his possession, and the only evidence presented to contest C's possession was that she had lived with D for only a short time.

FINDING

The taxpayers' protest is denied.